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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND ITS AFFILIATED COMPANIES, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 65–130) are reported in 4 N. L. R. B. 71. The opinion of the Circuit Court of Appeals (R. 1737–1747) is reported in 95 F. (2d) 390.

JURISDICTION

The decree of the court below (R. 1748) was entered on March 21, 1938. The petition for a writ of certiorari was filed on April 2, 1938, and

was granted on May 16, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10, paragraphs (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act, as applied to these petitioners, is a valid exercise by Congress of its power to regulate commerce among the States.

2. Whether petitioners were denied due process of law by reason of the fact:

(a) That they were ordered to cease and desist from giving effect to certain contracts, admitted in evidence, which were found to have been executed in continuation and culmination of the unlawful coercion of employees charged in the complaint, where petitioners themselves introduced evidence concerning the contracts and raised the issue of their effect by claiming that their execution was a complete defense to the charges of coercion;

(b) That no intermediate report was made by the Trial Examiner and no oral argument was had before the Board;

(c) That the Board declined to permit testimony concerning the discharge of Stephen Solosy by certain of petitioners' witnesses, who were available and could have been produced at the close of the Board's case, at an adjourned hearing, subsequently held for the purpose of taking the testi-

mony of certain other petitioners' witnesses theretofore unavailable, where petitioners were afforded the opportunity to call all available witnesses prior to the adjourned hearing, and did not thereafter pursue their statutory right to apply to the court below for leave to adduce such additional testimony.

3. Whether certain of the findings of the Board are supported by evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151, *et seq.*) are set forth in the Appendix, pp. 71–76, *infra*.

STATEMENT

Pursuant to charges duly filed by the United Electrical and Radio Workers of America, a labor organization (hereinafter referred to as United) (R. 4–6), the National Labor Relations Board, by its Regional Director at New York City, issued its complaint against petitioners on May 12, 1937 (R. 7–16). In addition to jurisdictional allegations, the complaint, as thereafter amended (R. 40–41, 164–165, 405–409, 525–526), alleged that petitioners had employed and were employing industrial spies for the purpose of ascertaining the union activities of their employees; that petitioners had discharged and had refused to reinstate six named employees because of their union activities; that petitioners

had contributed and were contributing financial and other support to the International Brotherhood of Electrical Workers, a labor organization (hereinafter referred to as the Brotherhood), and had coerced and were coercing their employees to join or assist the said organization; and that by all of the foregoing acts, petitioners had engaged and were engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (2), and (3), and Section 2, subdivisions (6) and (7) of the Act.

Copies of the complaint and of a notice of hearing thereon (R. 16–17) were duly served upon petitioners, and United and the Brotherhood were given notice thereof (R. 17–18).[1] On May 17, 1937, petitioners, appearing specially, filed a motion to dismiss the complaint on jurisdictional grounds (R. 19–33).[2] Pursuant to an amended notice of hearing served upon petitioners, with notice to United and the Brotherhood[3] (R. 34–36), a hearing was held on June 3, 10, 11, 14–17, 23, 24, and

[1] The sufficiency of the notice of the Brotherhood is challenged by its brief in this Court (No. 25). See brief for the Board in No. 25, pp. 3–4, 6–7. The petitioners herein, in their Memorandum in Support of Motion for a Stay, filed in the court below, have acknowledged (p. 5) that "The I B E W was given notice of the pendency of the proceedings."

[2] This motion, later renewed, was denied (R. 1200).

[3] The Brotherhood also challenges the sufficiency of the service on it of the amended notice of hearing. See footnote 1, *supra*.

July 6, 1937, at New York City, before a Trial Examiner duly designated by the Board (R. 37). On June 16, 1937, during the hearing (R. 803–804), petitioners filed an answer to the complaint as amended to June 14, 1937, which reserved their jurisdictional objections, denied the alleged unfair labor practices, alleged the execution of certain contracts executed by petitioners with certain locals of the Brotherhood, and set forth certain affirmative defenses (R. 42–63). At the close of the Board's case the Trial Examiner granted petitioners' motion to amend their answer to include the contracts as a separate defense to the charge of coercion (R. 1200–1201).

Petitioners' counsel then requested an adjournment until July 6, 1937, to enable him to prepare petitioners' case, and in particular to secure the testimony of Floyd L. Carlisle and Harold Dean, both of whom were said to be unavailable and whose testimony was asserted to be indispensable (R. 1185–1192). The reasons offered for not calling other witnesses at the close of the Board's case was that petitioners' counsel required time to examine the record and see what testimony to present in rebuttal, and that the Board had completed presentation of its case sooner than had been anticipated by petitioners' counsel (R. 1188–1189). Counsel for the Board had announced on June 23 that the Board's case would probably be completed on the following day (R. 1102). The Trial Examiner, on June 24, 1937, offered to recess the hear-

ing until June 25 for the purpose of receiving the testimony of any of petitioners' witnesses who were available (R. 1311). This offer was apparently not acceptable to petitioners. The Examiner then granted the adjournment to July 6 for the purpose of receiving the testimony of Carlisle, who was said to be abroad, and reserved decision until the hearing was resumed on July 6 whether the testimony of Dean, who was said to be in Milwaukee, and of other witnesses, would be received (R. 1192).

Petitioners, having asked for and received from the Trial Examiner permission to do so, presented this matter directly to the Board by letter dated June 28, 1937 (R. 1545–1547). By reply letter, dated July 2, 1937, the Board stated that it would permit both Carlisle and Dean to testify on July 6, but would not permit any other witness then to testify on the ground that such available witnesses should have been produced upon completion of the Board's case (R. 1548). After the testimony of Carlisle and Dean had been received on July 6, the Trial Examiner, in accordance with the Board's directions, refused to permit a witness called by petitioners to testify concerning the discharge of Stephen L. Solosy (R. 1309–1313). Petitioners then made an offer of proof concerning the discharge of Solosy and Philemon Ewing (R. 1314–1315). As to Ewing no discriminatory discharge had been alleged, nor did the Board make any order

respecting his discharge. No offer of proof as to any other matter was tendered by petitioners. On July 15, 1937, petitioners submitted a brief (R. 71, 1316).

By order of the Board dated September 29, 1937, the proceeding was transferred to and continued before the Board in accordance with Article II, Section 37 of the Board's Rules and Regulations, Series I, as amended (R. 64). No oral argument was had, none having been requested by petitioners.[4] On November 10, 1937, the Board issued its decision affirming the rulings of the Trial Examiner and setting forth its findings of fact, conclusions of law, and order (R. 65–130). The facts as disclosed by the Board's findings may be summarized as follows:[5]

1. *The nature of petitioners' business.*—Petitioners, operating as a system under a unified ownership and management, are engaged in the business of supplying electricity, gas, and steam to consumers in New York City and Westchester County, New York. In 1936 the system supplied 97.5 percent of the total electric energy sold in New York City (R. 72–76).

The major portion of the raw materials, supplies, and equipment used in the production of all the electric energy, gas, and steam sold by petitioners moves to their plants from States other than

[4] Petitioners allege (Br. pp. 8, 32) that a request was made. The facts bearing on this are fully discussed at pp. 48, 55–58, *infra*.

[5] The facts with relation to petitioners' enterprise are more fully detailed at pp. 20–22, *infra*.

New York. All of the approximately 5,000,000 tons of coal utilized in 1936 was shipped from mines in other States to petitioners' plants, where it was unloaded and handled by petitioners' own equipment and employees. All of the approximately 115,000,000 gallons of oil consumed in that year was likewise transported in interstate commerce from wells and refineries in other States to petitioners' plants. Substantial quantities and proportions of cable, copper, and other materials and supplies are purchased from sources located outside the State (R. 77–78).

The record furnishes many particular illustrations of the dependence on petitioners' services of various enterprises engaged in interstate and foreign commerce. Thus, petitioners supply the electric energy used by most interstate railroads for the operation of interstate trains and interstate passenger and freight terminals. Steam is supplied to operate compressors for the switches in the interstate railroad tunnel of the Pennsylvania Railroad under the North River. Petitioners also supply electricity to the Port of New York Authority for the operation of its terminal, the Holland Tunnel, and its other projects (R. 78–80). In the fields of interstate and foreign communication, petitioners supply telegraph, telephone, and radio systems (R. 81–82). In navigation, petitioners supply electric energy used in the operation of

piers, slips, wharves and terminals of steamship companies and interstate ferries (R. 80–81). Into a miscellaneous but important group of customers fall, *inter alia:* the post-offices and the United States Barge Office and Custom Houses; the Floyd Bennett Air Field; the Dow-Jones & Co., Inc., Ticker Service; the New York Stock Exchange; and the New York Times. All are dependent upon petitioners for their interstate operations and activities (R. 80–82).

2. *The unfair labor practices.*[1]—In 1933, as a means of purported compliance with the collective bargaining provisions of the National Industrial Recovery Act, petitioners conceived and initiated, and thereafter entirely supported, certain Employees' Representation Plans (R. 85–90). As late as April 1937, when United instituted a campaign for membership among petitioners' employees, petitioners countered with their own campaign to force the employees to pledge adherence to the Plans (R. 90).

When the decisions of this Court sustaining the present Act were rendered on April 12, 1937, petitioners abruptly altered their labor tactics. After two conferences between D. W. Tracy, the International President of the Brotherhood, and Carlisle, who was in charge of petitioners' labor policy, Tracy wrote Carlisle on April 16, 1937, demanding recognition of the Brotherhood and proposing a

[1] The facts with relation to the unfair labor practices are more fully detailed at pp. 33–37, 59–68, *infra*.

contract by which the Brotherhood would be recognized as the representative of its members. Without seeking to ascertain the desires or views of their employees upon the subject, and without making any inquiry as to the number of their employees belonging to the Brotherhood, Carlisle announced at a meeting of the Plan on April 20, 1937, called by him for that purpose, that petitioners had decided to recognize the Brotherhood. Despite protests and requests by the employees for a delay of recognition until it could be discussed, petitioners immediately recognized the Brotherhood along the lines of the proposed contract. At the meeting on April 20, Carlisle agreed that he had hitherto considered unions as unnecessary evils, but now considered them as necessary evils, and as between the Brotherhood and United he preferred the Brotherhood (R. 91–93).

According to plan, seven Brotherhood locals were quickly set up throughout petitioners' system in the place of the old Plans, and petitioners set in motion a vigorous campaign to intimidate, influence and coerce the employees into joining the Brotherhood (R. 93–99). Then, as the last act in completion of the scheme of controlling the selection by their employees of representatives for collective bargaining purposes, petitioners, between May 28 and June 16—after the Board's complaint had been issued—entered into seven substantially similar contracts with the seven Brotherhood locals (R. 99–102). Although these contracts recognized the Brotherhood as the representative of

its members and were applicable in terms only to such members, petitioners construed them as exclusive collective bargaining agreements and freely admitted that they would not bargain collectively with any other labor organization during the existence of these contracts (R. 100–102).

In addition, the Board found that petitioners had employed industrial spies for the purpose of uncovering the union activities of their employees (R. 103–105), and had discharged six employees because of their union activity (R. 106–125).

All of these aforementioned acts, the Board found, tended to lead to labor disputes burdening and obstructing commerce and the free flow thereof (R. 125). The Board concluded that petitioners had engaged in unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act. The complaint with respect to Section 8, subdivision (2) of the Act was dismissed (R. 126–127, 130).

The order of the Board (R. 127–130) entered on the basis of these findings, in addition to requiring petitioners to reinstate to their former positions with back pay the six employees discharged, directed petitioners to cease and desist (1) from discouraging membership in United or any other labor organization of their employees by any manner or means of discrimination, or encouraging membership in the Brotherhood or any other labor organization of their employees by any manner or

means of persuasion, intimidation or coercion; (2) from permitting any representatives of the Brotherhood or any other labor organization to engage in union activities during working hours unless like privileges were granted all other labor organizations of their employees; (3) from permitting petitioners' employees who were officials of its Employees' Representation Plans to use petitioners' time, property and money on behalf of the Brotherhood or any other labor organization; (4) from employing detectives or other means of espionage to investigate their employees' union activities; and (5) from giving effect to their contracts with the Brotherhood or recognizing the Brotherhood as the exclusive representative of their employees.

On November 18 and 22, 1937, petitioners and the Brotherhood,[1] respectively, filed in the court below their separate petitions to review and set aside the Board's order under Section 10 (f) of the Act (R. 1473–1553; 1554–1691). The Board answered each petition, praying for enforcement of its order in full (R. 1691–1711; 1711–1725). Petitioners and the Brotherhood each replied to the Board's answers (R. 1726–1733; 1734). On petition filed, United was permitted to intervene (R. 1735, 1737). On March 14, 1938, the court below

[1] The Brotherhood was not a party to the Board proceedings. Its participation in the proceeding before the court below was as a "person aggrieved" under Section 10 (f) of the Act (R. 1554).

rendered an opinion upholding the Board's order in every respect (R. 1737–1747). A decree of enforcement was entered on March 21, 1938 (R. 1748). On May 16, 1938, this Court granted writs of certiorari (R. 1748).

SUMMARY OF ARGUMENT

I

The test of permissible application of the National Labor Relations Act to an industrial enterprise is whether "stoppage of * * * operations by industrial strife" in that enterprise would result in substantial interruption to or interference with the free flow of interstate commerce. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. Here the facts indicate clearly that the test is met. Petitioners' operations are such that their cessation by reason of industrial strife would block interstate transportation to and from New York City on several main interstate railroads; other facilities of transportation in the area, such as automobiles, trucks and buses, as well as ferries and other transportation by water, would be seriously hampered; communications by telegraph, telephone and radio would be seriously affected; and many other enterprises, with large and important interstate operations, would be forced to shut down. Plainly, the effect upon interstate commerce of an interruption of petitioners' service by a labor dispute would be, as the court below said, "catastrophic" (R. 1741).

In addition, stoppage of petitioners' operations would interrupt a substantial flow of materials and supplies into the State. Petitioners are themselves engaged in interstate commerce by reason of their purchase in other States of large quantities of coal and oil.

Petitioners' chief argument that the Act may not be constitutionally applied to them is based upon the lack of a finding that there exists a necessity for Congressional regulation in the present case. The argument is directly contrary to the findings and intention of Congress under the present Act and to the decisions of this Court. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453.

The present case is not distinguishable from the *Santa Cruz* case on the ground that here the Act is sought to be applied to protect an interstate flow of raw materials although there is no subsequent flow of the finished products or other materials into other States. If Congress has the power to remove a burden to a substantial flow of commerce from a State, it would completely ignore reality if it did not also have the power to remove the burdens to the same flow which arise by reason of acts consummated in the State of destination. On many previous occasions the Court has sustained such a power. *E. g., Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *Local 167, Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.

II

A

1. Paragraphs 1 (f) and (g) of the order of the Board, which require petitioners to cease and desist from giving effect to their contracts with the Brotherhood and from recognizing it as the exclusive bargaining representative of its employees, are in all respects valid and proper under the Fifth Amendment. The record is clear that the contracts were part and parcel of petitioners' illegal purpose to select a representative for its employees, place that organization in an openly favored position in the plants, and perpetuate their interference with their employees' freedom of choice by maintaining it in that position. The contracts, therefore, were clearly illegal under the Act, and fall by reason of such illegality. *United States* v. *Reading Co.*, 226 U. S. 324, 357. Moreover, under these circumstances, and in order to establish conditions under which the employees might exercise an unfettered choice as to their collective bargaining representatives, it was clearly proper and within the power of the Board to order petitioners to cease and desist from giving effect to the contracts and from according exclusive recognition to the Brotherhood. The same type of relief has frequently been afforded by the Board and has been approved by this Court. *National*

Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.

2. Petitioners' contention that they were not reasonably apprised that the validity of the contracts was in issue in the proceedings can not be sustained by the record. The complaint, filed before any of the contracts were signed, informed petitioners that the legality of their relations with the Brotherhood was challenged. The answers filed by petitioners alleged the contracts as a complete defense. The course of the hearings was directed in large part to the question of the validity of the contracts. Indeed, the brief filed by petitioners with the Trial Examiner devoted considerable space to the question of their validity.

Under these circumstances petitioners not only had, but exercised, an opportunity to present their case with full knowledge that the validity of the contracts was a subject of inquiry. No other prejudice being alleged, due process was not denied by the absence of an intermediate report. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351. The same facts serve to answer petitioners' contention that the absence of oral argument deprived them of an opportunity to discover that the validity of the contracts was in issue. Moreover, the record is clear that petitioners did not ask for either an oral argument or an intermediate report, and had no

reason to expect that either would be granted in the absence of a request.

3. Even assuming that petitioners were not in fact adequately informed prior to the entry of the Board's order that the validity of the contracts was in issue, nevertheless they are not prejudiced. They might have applied to the Board for a rehearing, or they might have applied to the court below pursuant to subsections (e) and (f) of Section 10 of the Act for leave to adduce additional evidence on the contract issue. They did neither.

4. In any event, the remainder of the order is unaffected. Petitioners do not contend that the asserted failure to apprise them that the validity of the contracts was in issue in any way prejudiced them on any other branch of the case.

B

Petitioners have no valid ground of complaint based upon the refusal of the Board to hear the proffered testimony of two witnesses on July 6, 1937. With adequate notice that the Board's case was to be concluded, petitioners' counsel sought a postponement of the presentation of his case to the later date. The ruling of the Board that evidence of witnesses available when the Board's case was completed would not be received at a later date was reasonably within the Board's discretion. In

any event petitioners, having failed to ask the court below for leave to adduce additional evidence, are in no position to claim prejudice by reason of the ruling.

Since the petitioners' offer of proof on July 6th went solely to the single issue of whether the discharge of one man was discriminatory, it is plain that the validity of other portions of the order are not affected.

C

Nor is the order as a whole rendered invalid by reason of the absence of an oral argument before the Board. The record shows clearly that petitioners did not request an oral argument, and had no reason to expect one in the absence of a request. Moreover, the Fifth Amendment is fully complied with since petitioners had previously filed a lengthy brief. *Morgan* v. *United States,* 298 U. S. 468, 481.

III

Petitioners' contention that the evidence does not support the findings is without merit. The evidence is fully set out at pages 33–37, 59–69, *infra,* and need not be summarized here. Nor does the record support petitioners' contention that the findings were based on hearsay evidence. There was direct testimony on each issue. In any event, hearsay evidence was clearly proper. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.,* 253 U. S. 117.

ARGUMENT

I

THE NATIONAL LABOR RELATIONS ACT, AS HERE APPLIED TO PETITIONERS, IS A VALID EXERCISE OF THE POWER OF CONGRESS OVER INTERSTATE COMMERCE

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41, the Court laid down the test of permissible application of the National Labor Relations Act to an industrial enterprise: Would "stoppage of * * * operations by industrial strife" in that enterprise result in substantial interruption to or interference with the free flow of interstate commerce? To the extent necessary to answer that question the test is determined by the facts with respect to the particular enterprise. The existence of the nexus between unfair labor practices condemned by the Act and industrial strife may not be challenged; it is concluded for all cases by the finding of Congress in Section 1 of the Act—a finding which was approved by the Court in the *Jones & Laughlin* case. See 301 U. S. at 42, 43. Nor is it material whether there has been industrial strife interrupting the business of the particular employer. *Ibid.*[8] We

[8] It is wholly irrelevant to the real issues involved under the commerce clause to argue, as do petitioners (Br. p. 61), that "the 'ifs' in the causal sequence [between the unfair labor practices and the interruption to interstate commerce] are manifest."

turn, then, to the effect on interstate commerce of industrial strife in petitioners' operations.

The facts bearing on this question were the subject of a detailed and comprehensive stipulation (R. 1318–1388), and are not in dispute. Upon these facts, we submit, it is clear that cessation or restriction of petitioners' operations by industrial strife would have a much more far-reaching and instantaneous effect upon interstate commerce than that upon which jurisdiction was grounded in the *Jones & Laughlin* case.

Petitioners constitute a unitary system engaged in the production, distribution, and sale of electricity, gas, and steam in the City of New York and adjacent Westchester County (R. 1321–1323, 1343–1354). New York City is, in fact, almost entirely dependent upon petitioners for electricity; in 1936 they supplied 97.5 per cent of all such energy sold by central station utilities in the city (R. 1350).[*] A general cessation of petitioners' operations would have an instantaneous effect upon the general economic life of the city. Its effect

[*] During 1936 petitioners also supplied practically all of the electricity sold in Westchester County, all of the gas sold in that county, and 55.3 per cent of the gas sold in New York City (R. 1349–1350). They also operate the only central-station steam utility in the city (R. 1350).

The magnitude of petitioners' enterprise is indicated by its revenues—$232,373,198.92 in 1936 from the sale of its three principal products—and by its pay roll—$81,891,990.40 for the same year, distributed among approximately 42,000 employees (R. 1347, 1349, 1351, 1340, 1342).

upon interstate and foreign commerce, in particular, is set out in detail in the record.

Cessation of petitioners' operations, without more, would instantaneously block all interstate transportation to and from the nation's leading commercial center on three interstate railroads—the New York Central, the New York, New Haven & Hartford, and the Hudson & Manhattan—and plunge their freight and passenger terminals into darkness (R. 1383–1386).[18] Interstate transportation by automobile, truck, and bus would be substantially crippled, inasmuch as the Holland Tunnel, various bridges, and the freight terminal of the Port of New York Authority all rely upon electricity supplied by petitioners for their continued operation (R. 1383–1386). Interstate ferries would be hampered by lack of electric power to operate slips and terminals, and foreign and coastwise trade would be additionally obstructed by lack of electricity not only for piers and wharves, but also for lighthouses, beacons, and other aids to navigation in New York harbor (R. 1383, 1387).

[18] Petitioners also supply electricity for the Manhattan terminal of the Lehigh Valley Railroad and steam for the operation of switches in the Pennsylvania Railroad's tunnel under the North River (R. 1386). Since the conclusion of the hearings, petitioners have announced the execution of a contract by the Pennsylvania Railroad to purchase from them electricity to operate trains to and from New York. The announcement states that with the new customer petitioners "* * * Will Supply the Traction Power for All the New York City Trunkline Railroads." *Around the System* (August, 1938), p. 1.

In the field of communications the havoc would be equally great. Most interstate and foreign communication by telegraph, telephone, and radio would immediately stop, since the Western Union Telegraph Company, the Postal Telegraph Company, the New York Telephone Company, RCA Communications, Inc., and the Columbia Broadcasting System depend upon petitioners for maintenance of their services (R. 1377–1380). Even the mails would be impeded by lack of electricity to operate the pneumatic tubes and to light and operate the various postal stations (R. 1376).

The record mentions specifically many other enterprises with large and important interstate operations or services which would be crippled or forced to suspend operations completely if electric power failed—the New York Stock Exchange, the Dow-Jones & Co., Inc., ticker service, the New York Times and the Floyd Bennett Airport (R. 1381–1382). Finally, with respect to the innumerable commercial and manufacturing enterprises in New York City engaged to a greater or lesser degree in interstate commerce, the Board concluded that cessation of electric power would be substantially equivalent, in its effect upon interstate commerce, to simultaneous labor disputes in all these businesses (R. 85. See also R. 1343–1349, 1357, 1373).[11]

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[11] The record shows to some extent the actual effect of a cessation of petitioners' service. On January 15, 1936, a short circuit at one of the generating plants interrupted the

Plainly, the court below did not exaggerate in stating that the result of an interruption of petitioners' service by a labor dispute would be "catastrophic" (R. 1741), nor did it err in stating that the effects on interstate commerce could not in any realistic view be deemed "indirect and remote" (*Ibid.*). No previous case in which this Court has sustained the exercise of Congressional power to protect commerce from the burdens of labor disputes reveals an effect even comparable to the complete collapse of economic activity which would result from labor disputes in petitioners' organization.[18] "A judgment that does not ignore actual

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alternating current service in parts of Manhattan and the Bronx. Service to some 40,000 consumers, involving about 10 percent of the load, was affected. The operations of several telephone exchanges, branch post offices, and various industrial and commercial concerns were wholly or partially impeded (R. 1357–58). A city-wide stoppage through a labor dispute, and the consequent inability of petitioners to maintain service in the area affected through the breakdown of a single plant by shifting the load to other stations, would, of course, have far greater effects upon commercial activities. In their brief filed with the Board, petitioners admitted (p. 106) that "In a delicate and intricate mechanism such as the [petitioners'] generating and distributing systems, one * * * employee * * * may cause a suspension of the service on which millions of people depend." See footnote 27, p. 46, *infra*.

[18] See, *e. g.*, *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453; *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association*, 274 U. S. 37; *Loewe* v. *Law-*

experience" (301 U. S. at 42) must, we submit, conclude that petitioners' operations have that "close and intimate" relation to commerce which warrants application of the Act.

In addition to the serious effects which a stoppage of petitioners' operations would have upon the interstate and foreign commerce of enterprises which depend on them for power and light, petitioners are also subject to the jurisdiction of the Board on an entirely independent basis, namely, the interstate commerce in which they are engaged. Petitioners constitute an industrial enterprise of considerable magnitude (see pp. 7–8, 20–22 *supra*) which is almost completely dependent upon interstate commerce for its raw materials, supplies, and equipment. During 1936, for example, practically all of the 5,000,000 tons of coal and 115,000,000 gallons of oil used by petitioners were brought to their plants from outside the State of New York (R. 1364–1368). Large quantities of cable, copper and other supplies were obtained in other states (R. 1369–1371). These huge movements in interstate commerce would be interrupted by strife between petitioners and their employees.

Petitioners do not deny that a cessation of their operations would affect commerce in either of the two respects discussed above. They deny, however, that the effects are legally sufficient to warrant

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lor, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Local 167, Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.

the application to them of the National Labor Relations Act. Their general contention, based upon certain language in *Florida* v. *United States*, 282 U. S. 194, is that the Act may be applied only where the predominant effect of a stoppage is on interstate commerce rather than on local activity. That condition, they contend, does not exist in the present case. More specifically, petitioners deny any legal significance to the use of their electric light and power by enterprises engaged in interstate commerce, and to the flow of their raw materials into the State of New York. Each of the contentions is without merit.

The contention that if, as petitioners allege, the effects of a stoppage of petitioners' operations are predominantly local, the State of New York, and not the Federal Government, should control the labor relations in their plants is in direct conflict with the decision of this Court in *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453. Admittedly, there, the employer was engaged chiefly in intrastate commerce. The Court, however, applied the well-settled rule that where federal regulation cannot be applied to protect interstate commerce without at the same time protecting intrastate transactions, the federal regulation may be applied to the whole. *Second Employers' Liability Cases*, 223 U. S. 1, 51; *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 351–352, 355; *The Minnesota-Rate Cases*, 230 U. S. 352, 399; *National Labor Relations Board* v. *Jones*

& Laughlin Steel Corp., 301 U. S. 1, 37–38. Indeed, any different conclusion would completely nullify the necessary supremacy of federal authority.

Petitioners' brief on this point would be much more appropriately addressed to an argument on the propriety of federal regulation than to one on constitutional power. On the question of policy, the existence of a labor relations act in the State of New York would be a factor to be considered; on the question of power, it is wholly irrelevant. The power of Congress to prevent serious interruptions to interstate commerce must be the same in all states.

Certainly the cases upon which petitioners rely do not prove the contrary. In *Florida* v. *United States*, 282 U. S. 194, the Interstate Commerce Commission had prescribed intrastate freight rates in Florida. The Court, in the sentence immediately preceding the language quoted by petitioners (Br. p. 57), states: "The question in the present cases, then, is not one of authority, but of its appropriate exercise." 282 U. S. at 211. The subsequent conclusion of the Court that the Interstate Commerce Act required more detailed findings as to the necessity for local regulations than the Commission had made in that case can have no possible bearing here. Congress itself, in the present Act, has made the findings which the Court thought necessary in the *Florida* case. As pointed out above (*supra*, p. 19) Congress has found that un-

fair labor practices are a prolific cause of labor disputes—a finding which is not contradicted, but supported, by argument that a state has also taken similar measures to insure industrial peace. Congress has not limited the application of the Act by any concept of preponderance of damage. Consequently, upon findings that the relation of an enterprise to interstate commerce is such that unfair labor practices in the enterprise will "affect commerce", the jurisdiction of the Board attaches, irrespective of the local results which may also be achieved, and of the local measures which may also have been taken.[13] *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board, supra.*

Petitioners attempt to avoid the application of the *Santa Cruz* decision by asserting that the employer there was at least partially engaged in interstate commerce,[14] whereas here petitioners' operations are wholly intrastate—that the commerce interrupted would be that of petitioners' custom-

[13] The other cases cited by petitioners are even less applicable. In *Pennsylvania* v. *Williams*, 294 U. S. 176, the issue was wholly one of the discretionary exercise of admitted power. In *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, a federal statute directly interfered with the reserved powers of the State to charter and control corporations. No question was raised under the commerce clause.

[14] Petitioners' assertion (Br., p. 67) that the interstate aspects of the enterprise were "dominant" in the *Santa Cruz* case is completely inconsistent with the fact. As a matter of percentages, only 37 percent of the product moved in interstate commerce, while 63 percent of it did not. See 303 U. S. at 467.

ers and not of petitioners. The claim is contradicted by the record, and, in any event is not a valid ground of distinction. Petitioners are, in fact, largely engaged in interstate commerce by reason of their purchase and receipt of huge quantities of supplies. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Local 167, Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.[15] But wholly apart from that fact, we believe the attempted distinction to be without merit. The commerce power is not concerned with the source of the burden, nor with the fact that, separately viewed, the burden is a local one. "It is the effect upon commerce, not the source of the injury, which is the criterion." *National Labor Relations Board* v. *Jones & Laughlin Steel Co., supra*, at 32. Application of the commerce power to intrastate transactions directly affecting interstate commerce, though carried on by persons not themselves engaged in interstate commerce, has frequently been upheld.

[15] Petitioners' contention to the contrary (Br., pp. 66–67) is based upon a line of cases holding that the sale of gas or oil *to consumers*, after it had been brought into the State, was not interstate commerce. We do not question that conclusion. See *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470. Petitioner's interstate commerce consists of purchasing materials and supplies in interstate commerce (see *e. g.*, Br., pp. 12, 64). None of the cases cited by petitioners denies that such purchases constitute interstate commerce; indeed they each affirm it. See *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309; *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148, 154.

United States v. *Ferger*, 250 U. S. 199; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Stafford* v. *Wallace*, 258 U. S. 495; *Local 167* v. *United States*, 291 U. S. 293. Thus the fact that the commerce interrupted may be that of petitioners' customers is entirely immaterial. That interstate commerce will be obstructed by petitioners' unfair labor practices is not open to challenge. In consequence, the Congressional power may be exercised to prevent that obstruction. Injurious restraint to a substantial portion of all commerce centered about New York City cannot be placed beyond federal control on the plea that its source is the unfair labor practices of someone other than those whose commerce is restricted.[16]

Finally, petitioners deny legal significance to the flow of raw materials to their plants and storehouses from without the State of New York. The critical fact, they say, is that although the coal, oil, copper and other materials originate outside the

[16] An incident in petitioners' own experience provides an illustration of the point under discussion. In 1936 petitioners took over two generating stations theretofore operated by the New York Central Railroad to supply electricity for its trains (R. 1246). At the time that these stations were being operated by the railroad, it could not be denied that interruption of their service would directly and seriously affect interstate commerce. In no respect whatever has that relationship been altered by the change in ownership. The "work done" and "its relation to interstate commerce" remain the same. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 557.

State, they are used wholly within the State, and in no instance move on to other States.

The contention ignores, of course, the fact that petitioners are themselves extensively engaged in interstate commerce in procuring such materials. See p. 28, *supra*. Moreover, it is manifest that commerce of the magnitude of that in which petitioners are engaged cannot be deemed without national significance on any such basis. In the *Jones & Laughlin* case the Court rejected the contention that the Act could be applied only to employees engaged in an intermediate process in an interstate flow of goods (301 U. S. at 36):

> The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources.

The authority of the *Santa Cruz* case is equally clear. There the Court applied the Act to protect substantial exports of finished products, although there was no antecedent flow of materials to the plant from other states. Here the Act is sought to be applied to protect an interstate flow of raw materials, although there is no subsequent flow of finished products or other materials into other states. We fail to see any rational distinction between the two situations. In *Coronado Coal Co.* v.

United Mine Workers, 268 U. S. 295, the Court sustained the power of Congress to remove a burden to a substantial flow of coal from the State where it was mined. It would completely ignore the realities to contend that it may not now remove similar burdens to the same flow of commerce which arise by reason of acts committed in the State of destination. National concern in an unobstructed flow remains the same from whichever end the flow is viewed and wherever the acts which obstruct it occur. On many previous occasions the Court has sustained the power of Congress to remove burdens on commerce in the State where the interstate movement ends. *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n.*, 274 U. S. 37; *Local 167, Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.

II

The Order of the Board is in all Respects Valid and Proper Under the Fifth Amendment

The contentions of petitioners with respect to the Fifth Amendment are made difficult of clear statement or answer by the indiscriminate mixture of apparently legal arguments, not elsewhere repeated, throughout the so-called "Summary Statement of the Proceedings" in their brief (see pp. 5-39). Their particular objections, however, appear to be directed at two portions of the order. Paragraphs 1 (f) and (g), which require petitioners to cease and desist from giving effect to their

contracts with the Brotherhood and from continuing to accord it exclusive recognition, are alleged to have been entered without adequate notice to petitioners that any question as to the contracts was in issue. The portion of Paragraph 2 of the order dealing with Stephen L. Solosy is alleged to have been entered without an adequate opportunity having been afforded petitioners to introduce rebuttal evidence. Finally, petitioners contend that the whole order should be set aside, not only because of these two alleged errors, but also because they were denied an intermediate report and an opportunity to be heard orally before the Board. Each of the contentions, we believe, is without merit.

A. PARAGRAPHS 1 (F) AND (G) OF THE BOARD'S ORDER ARE IN ALL RESPECTS VALID AND PROPER

1. THE BOARD WAS FULLY EMPOWERED TO REQUIRE PETITIONERS TO CEASE AND DESIST FROM GIVING EFFECT TO THE CONTRACTS WITH THE BROTHERHOOD [17]

Petitioners, by Paragraph 1 (f) of the order of the Board, are required to cease and desist from

[17] Petitioners' brief does not seriously question that this part of the order is within the powers of the Board and is supported by the findings and the evidence. The statement on page 80 denying that "at the hearing it was brought out that the contracts * * * were the culmination and the fruit of the coercion" seems to be directed only to the issue of adequate notice. The substantive validity of this part of the Board's order is directly challenged in the brief filed by the Brotherhood in No. 25 (pp. 43–49). The discussion of the issue is included in the present brief because of the other issues raised here with respect to Paragraphs 1 (f) and (g).

giving effect to their contracts with the Brotherhood and by Paragraph 1 (g) are ordered to cease and desist from recognizing the Brotherhood as the exclusive representative of its employees (R. 128). These portions of the order were based upon the conclusion by the Board (R. 102–103) that the contracts were simply a device to "consummate and perpetuate" petitioners' conduct in violation of the Act, and that petitioners must therefore be required to refrain from giving effect to them in order to establish conditions for the exercise of an unfettered choice of representatives by petitioners' employees (R. 103). Petitioners are not, of course, precluded from future relations with the Brotherhood, including the making of new contracts, after the effects of the unlawful acts of petitioners have been removed.

The record is clear, as the Board found, that the contracts were part and parcel of petitioners' illegal purpose to select a representative for their employees, place that organization in an openly favored position in the plants, and perpetuate their interference with their employees' freedom of choice by maintaining it in that position (R. 85–103). For almost two years after the passage of the National Labor Relations Act, petitioners supported a group of Employees' Representation Plans which they had established in 1933 (R. 85–91; 170–181, 207–208, 216, 424, 808–809, 816–819, 833–835, 842–843, 977–978, 987–988, 1206–1207, 1214–1215, 1243–1244). These Plans, in operation and

effect, were plainly management-controlled unions and were so regarded by the employees (R. 88–90; 183–186, 549, 597, 600, 606–607, 613–614, 625, 651, 821–822).

The decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases, on April 12, 1937, made plain, however, that the Plans were illegal (R. 91; 187–189, 843–844, 1206). Immediately thereafter Carlisle, the chairman of the Board of each of petitioners and directly and actively in charge of petitioners' labor policy, held two conferences with D. W. Tracy, the International President of the Brotherhood (R. 91; 1202–1203, 1219). On April 16, 1937, four days after the decision, Tracy wrote to Carlisle demanding recognition of the Brotherhood and a written contract (R. 91; 1203, 1204). In complete disregard of the fact, known to Carlisle, that the United was then actively engaged in organizing the employees (R. 93; 1218–1219), and without consulting any of the employees, Carlisle decided to grant Tracy's request (R. 91–93, 94–96; 877, 1204, 1221–1222). Four days later, on April 20, at a meeting of the Plan's officers which he had called, he peremptorily announced that the plans were being abandoned and that as between two necessary evils petitioners were recognizing the Brotherhood in preference to the United (R. 91–93; 189–190, 196, 843–844, 1204–1205). Although at this meeting Carlisle pointed out in reply to various questions from the floor that the employees were free to

join any labor organization (R. 91; 1208–1209), he was clear in his insistence, then and thereafter, that the management was committed to recognition of the Brotherhood as the "sole bargaining body" (R. 91–93, 101; 189–190, 195, 877–878, 891–892). This was a plain stand by petitioners that irrespective of the employees' wishes (R. 91–93, 94–96; 190–192, 194–195, 199, 203, 215–216, 891–892, 1204–1205), and despite their protest (R. 94–96; 190–191, 199, 203, 222, 240, 245–246, 259, 858–859), the choice of the management as to a collective bargaining agency was to control.

Carlisle had not at that time any information as to the size of the Brotherhood's membership among its employees (R. 92–93, 101; 1235–1238). Concededly petitioners' intention was to effect a shift of the seven Plans into seven Locals of the Brotherhood (R. 96, 99; 235, 252, 885, 1221–1223, 1235–1239). In accordance with this intention, petitioners initiated a vigorous campaign of intimidation and coercion to force the employees into the Brotherhood. Various of petitioners' officers expressed their views in favor of the Brotherhood and stated that its recognition was a blow to the Committee for Industrial Organization (R. 93–94; 206). Department heads and foremen, during working hours, solicited employees to join the Brotherhood and generally assumed the role of Brotherhood organizers, accompanying this activity with warnings and threats (R. 98; 224–225, 229, 245–248, 264–265, 294–295, 730–737, 746–748, 753–

754, 759–764, 849–857, 859–862, 929, 931, 932, 957–960, 980–982, 1033–1036, 1049–1050, 1055, 1070–1074, 1164–1167, 1174–1177, 1179–1181). Carlisle refused to order a halt to these activities on the sole ground that he had not authorized them (R. 95; 220–221, 877, 1210). Brotherhood organizers were given free access to all of petitioners' buildings, and were permitted to solicit employees individually and in groups during working hours, while similar privileges were denied to organizers for United (R. 98; 221, 877, 1139–1143, 1210). Brotherhood dues were collected on petitioners' premises, organizers even occupying offices of foremen for that purpose (R. 98; 737, 765–769, 867–868, 886–887, 1021–1022, 1036). Officers of the Plans, who *en masse* had become officers of the Brotherhood locals, were allowed to continue the exercise of their plan prerogatives on behalf of the Brotherhood during working hours, using petitioners' offices and secretarial services, utilizing expense accounts, and being paid their regular salaries for the time spent on Brotherhood work (R. 98–99; 879, 887–888, 956, 1063–1064, 1073–1074, 1077–1080, 1170–1174).

As the last step, and in completion and consolidation of the scheme, seven contracts were signed with the seven Brotherhood locals. Petitioners had not even then been supplied with information as to the size of the Brotherhood's membership.[18]

[18] Petitioners' first information as to the results of their joint efforts with the Brotherhood to secure members for it was received on June 29, 1937, after all the contracts had been

Nevertheless, petitioners construed the contracts as exclusive collective bargaining agreements, and admitted that they would not bargain collectively with any other labor organization during their existence, even though in terms they were made by the Brotherhood only as the representatives of its own members (R. 100–102, 1234–1235). Three of the contracts were consummated subsequent to the opening of the hearings on June 3, 1937; all were consummated after service of the Board's complaint (R. 100).

On these findings the contracts are clearly illegal. Not only are they a part of a scheme by which petitioners' employees were to be denied the right—guaranteed to them by Section 7 of the Act—freely to choose their own representatives, but they are also the culminating objective of the whole unlawful campaign. The contracts were, therefore, illegal under the Act and fell by reason of such illegality. *United States* v. *Reading Co.*, 226 U. S. 324, 357; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Schenck* v. *United States*, 249 U. S. 47, 52; *Duplex Printing Co.* v. *Deering*, 254 U. S.

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signed, and after the Board's case had been closed (R. 101; 1236, 1418). Even assuming the accuracy of the membership claimed by the Brotherhood at that time, it presents a significant contrast to the 15 members claimed by one Brotherhood organizer (R. 867–868) and to the "some members" claimed by Carlisle on April 20, prior to petitioners' campaign of intimidation and coercion. See footnote 19, page 38, *infra*. (R. 194–195, 1222).

443, 465–466. It was plainly an inference of fact for the Board whether the contracts, if continued in effect, would perpetuate petitioners' interference with a free choice of representatives by the employees. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.[19] In the light of the facts of the present case we submit that the Board could have reached no conclusion other than the one that it did. The employees who were coerced into joining the Brotherhood must, in the face of the contracts, have felt that it would be dangerous to withdraw and thereby openly repudiate their employers' choice. Moreover, the contracts, since they were construed by petitioners to be exclusive bargaining contracts, rendered futile any attempt by any of the employees to present their views and demands through representatives of their own choice.

Failure of the Board to require petitioners to cease giving effect to the contracts could only be interpreted by the employees as approval of the choice of representatives which petitioners have made for them. Employees who have not yet joined the Brotherhood would then deem it incum-

[19] Petitioners' repeated assertion (Br., pp. 34, 36, 90) that 80 percent of its employees had joined the Brotherhood by June 29, is, of course, wholly irrelevant. That the number claimed did join need not be denied, but the record indicates plainly that the men did not do so voluntarily, uninfluenced by their employer. What membership the Brotherhood would have obtained in the absence of pressure by petitioners cannot be known until the effects of that pressure, perpetuated by the contracts, is eliminated.

bent upon them to respect their employers' wishes. Even if they did not join the Brotherhood, well-publicized apparent approval of the contracts could only serve to deter them from joining other labor organizations, at which petitioners' finger of disapproval has unmistakably been pointed."

Nor is the order, under these circumstances, either drastic or unusual. It is appreciably less restrictive than that which was approved in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra,* in which the employer was required not only to withdraw all recognition from a labor organization and cease all relations with it, contractual and otherwise, but also to abstain from any such relation in the future, which is not the effect of the order here. Contracts have frequently been abrogated in order to provide adequate and appropriate affirmative relief, not only by the Board,[21] but also by its predecessor

[20] Petitioners' suggestion (Br., pp. 35–37) that requiring them to cease giving effect to the contracts furthered, rather than prevented, industrial strife is actually a contention that since employees have failed to strike in opposition to petitioners' denial of their rights, the Board must also acquiesce. The argument is expressly denied by the finding by Congress in Section 1 of the Act that unfair labor practices by employers leads to industrial strife. See p. 19, *supra.* The Act does not seek a forced truce resulting from successful repressive activity, but a stable peace based upon the adjustment of differences through negotiations between the employer and freely designated representatives of his employees.

[21] *Matter of Clinton Cotton Mills,* 1 N. L. R. B. 97; *Matter of Atlas Bag & Burlap Company, Inc.,* 1 N. L. R. B. 202;

established by Public Resolution No. 44, 73d Cong., 2d Sess. (48 Stat. 1183.) [22] The power to order petitioners to refrain from giving effect to illegal contracts is unquestionably constitutional. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 282; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 234–235; *Continental Insurance Co.* v. *United States*, 259 U. S. 156, 171; *Philadelphia, Baltimore & W. R. Co.* v. *Schubert*, 224 U. S. 604.[23]

Matter of Carlisle Lumber Co., 2 N. L. R. B. 248; *Matter of Hill Bus Company, Inc.*, 2 N. L. R. B. 781; *Matter of Lion Shoe Company*, 2 N. L. R. B. 819; *Matter of National Electric Products Corporation*, 3 N. L. R. B. 475; *Matter of Lenox Shoe Co., Inc.*, 4 N. L. R. B. 372; *Matter of Pacific Greyhound Lines*, 4 N. L. R. B. 520; *Matter of National Motor Bearing Company*, 5 N. L. R. B. No. 66; *Matter of Zenite Metal Corporation*, 5 N. L. R. B., No. 73; *Matter of Red River Lumber Company*, 5 N. L. R. B. 90; *Matter of Taylor Trunk Company*, 6 N. L. R. B., No. 11; *Matter of Missouri-Arkansas Coach Lines, Inc.*, 7 N. L. R. B., No. 28. See also, *Matter of Stone Knitting Mills Co.*, 3 N. L. R. B. 257; *Matter of Mine B Coal Company*, 4 N. L. R. B. 316; *Matter of American-West African Lines, Inc.*, 4 N. L. R. B. 1086; *Matter of McKesson & Robbins, Inc.*, 5 N. L. R. B., No. 12; *Matter of California Wool Scouring Co.*, 5 N. L. R. B., No. 105; *Matter of Pacific Lumber Inspection Bureau, Inc.*, 7 N. L. R. B., No. 72.

[22] *Matter of Hildinger-Bishop Company*, 1 N. L. R. B. (old) 127; *Matter of Kaynee Company*, 2 N. L. R. B. (old) 33; *Matter of John E. Lucey Shoe Co.*, 2 N. L. R. B. (old) 251.

[23] Petitioners also suggest that the Board was without power to issue Paragraphs 1 (f) and (g) of the order for the reason that no question as to representation of employees

2. PARAGRAPHS 1 (f) AND (g) OF THE ORDER DO NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW BY REASON OF ANY ALLEGED FAILURE BY THE BOARD TO REVEAL THAT THE CONTRACTS WERE IN ISSUE

We turn, then, to petitioners' contention that as a matter of procedure, Paragraphs 1 (f) and (g) of the order deprived them of due process of law, in that they were denied an opportunity to meet the contention that the contracts were invalid. The contention is based partially upon an alleged failure to raise the issue at the hearing before the trial examiner, and partially upon an alleged failure to be apprised of the issue after the hearing by reason of the absence of an intermediate report or an oral

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under Section 9 was presented and because the Board dismissed so much of the complaint as alleged violations of Section 8 (2) (Br. pp. 37, 38). Both contentions are without merit. The illegal interference with employees by reason of the contracts must be remedied regardless of whether a majority of the employees have selected a representative other than the Brotherhood under Section 9 (c); indeed, no proper determination of representatives could be made so long as the effects of petitioners' coercion are continued. The same contention was rejected in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. Nor was it necessary for the Board to find that petitioners had dominated the Brotherhood within the meaning of Section 8 (2). Exclusive bargaining relations may violate the Act either because of the statutory incapacity of one of the parties to represent employees or because the relations were themselves founded on coercion and their continuance perpetuates its effect. In the former case, violation of Section 8 (2) would be the basis of the order. In the latter case, as is true here, it is not the basis of the order, and is entirely irrelevant to the appropriateness of the relief.

argument. In neither respect is the contention meritorious.

A brief survey of the pleadings and the course of the proceedings at the hearing in this case reveals that petitioners were clearly apprised that the validity of the contracts with the Brotherhood locals was directly in issue. The complaint could not, of course, have contained a specific reference to the contracts, since at the time it was issued and served none of the contracts had been executed. It did, however, allege that petitioners were interfering with their employees' rights of self-organization by coercing them to join the Brotherhood and by contributing support to that organization, in violation of Section 8, subdivisions (1) and (2), of the Act (R. 15). These allegations informed petitioners that the legality of their relations with the Brotherhood was challenged; that all acts in furtherance of the coercion and support alleged were the subject of inquiry and would be sought to be proved; and that if proved, they would be corrected by an order of the Board.[24] The complaint indi-

[24] Petitioners make passing reference (Br. p. 6) to the fact that Paragraph 22, which charged petitioners with coercing their employees into joining the Brotherhood and alleged that this conduct was an unfair labor practice within the meaning of Section 8 (1), was not referred to in Paragraph 23 of the complaint, which contained the express allegation that the activities enumerated in the preceding paragraphs affected commerce. The omission was clearly an inadvertance, and could scarcely have been misleading. It

cated, in other words, that the very purpose of the hearing was to bring to light the various methods used by petitioners to violate the Act within the limits specified in the complaint, *i. e.*, petitioners' relations with the Brotherhood. The function of the complaint ended with the specification of these limits. Cf. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 430–431; *Florida* v. *United States*, 282 U. S. 194, 209; *Philadelphia & Reading R. Co.* v. *United States*, 219 Fed. 988, 992, reversed on other grounds, 240 U. S. 334. Subsequent dismissal of the complaint insofar as it alleged violations of Section 8 (2) did not, of course, deprive petitioners of the notice which they had received by the complaint.

The complaint, accordingly, would have adequately raised the contracts issue even had the contracts been entered into before it was filed. Here there is the additional fact that *after* a complaint had been received which challenged the legality of petitioners' relations with the Brotherhood, petitioners nevertheless during the course of the proceedings entered into contracts with the Brotherhood. Under those circumstances the contracts were subject to the power of the Board to restore the *status quo* as of the time of the service of the complaint. *Jones* v. *Securities & Exchange*

would have rendered Paragraph 22 entirely superfluous and meaningless; and it was corrected by amendment on June 14, before the hearing was far advanced (R. 15).

Commission, 298 U. S. 1, 15, 18; *Wingert* v. *First National Bank,* 223 U. S. 670, 672.

But we need not rest there, for petitioners brought the contracts directly into issue by their verified answer, filed on June 16, 1937, the day on which the last of the seven contracts was executed (R. 58). On July 6, 1937, petitioners formally amended their answer to aver as a defense that the contracts had rendered the matters alleged in the complaint moot and, further, had deprived the Board of "power or jurisdiction to hear or determine any such allegations or proofs or to grant any relief upon the basis thereof * * *" (R. 1200–1201). Since invalid contracts are nullities, and obviously could not have had the effect attributed by petitioners to their contracts with the Brotherhood, reliance by petitioners on the contracts necessarily put their validity in issue.[25] *New York Life Ins. Co.* v. *Aitkin,* 125 N. Y. 660, 672; *Whipple* v. *Brown Bros. Co.,* 225 N. Y. 237, 239–240; *Sarnighausen* v. *Scannell,* 11 Cal. App. 652, 656; *Kenfield* v. *Weir,* 16 Cal. App. (2d) 501, 502; *Richardson* v. *Buhl,* 77 Mich. 632, 656; *McKenzie* v. *Sifford,* 45 S. Car. 496; *Williams* v. *Jefferson Standard Life Ins. Co.,* 181 S. Car. 344,

[25] No reply was required to put such matters in issue by the Act, by the Federal Equity Rules then in force, or by the state practice. Equity Rule 31; New York Civil Practice Act, Section 274; *New York Life Insurance Co.* v. *Aitkin,* 125 N. Y. 660; *Whipple* v. *Brown Bros. Co.,* 225 N. Y. 237.

351–352; *Jordan* v. *Coulter,* 30 Wash. 116. See *City of Denver* v. *Mercantile Trust Co.,* 201 Fed. 790, 810 (C. C. A. 8th).

Nor could the course of the hearings have left petitioners with any doubt that the validity and effect of the contracts were in issue. Counsel for both parties elicited testimony as to the circumstances of their execution. Of the 28 witnesses called by the Board, 19 testified, without objection by petitioners, to facts clearly bearing upon petitioners' unlawful motives in entering into the contracts, and to the precipitate manner in which they were executed following the decision of the *Jones & Laughlin* case by this Court.[26] On petitioners' side, the testimony of Carlisle (R. 1202–1251), who was called immediately following petitioners' amendment of their answer to raise the issue as to the contracts, was devoted almost entirely to the circumstances surrounding the execution of the contracts, in an obvious attempt to establish their validity. This is particularly evident from his testimony on cross-examination (Fols. 3652–3655, 3707–3712, 3715, 3731, 3722–3724, 3700–

[26] Straub (R. 167–297, 804–845); Harding (R. 729–744, 791–799); Symon (R. 745–748, 800–802); McCarthy (R. 749–789); Joy (R. 845–921); McCormick (R. 921–941); Gideon (R. 942–965); Young (R. 967–990); Spalding (R. 991–1020); Balch (R. 1020–1029); Brady (R. 1029–1046); Misbach (R. 1047–1064); Crowell (R. 1065–1076); Shedlock (R. 1076–1086); McGowan (R. 1129–1138); De Lude (R. 1138–1162); Chandley (R. 1163–1169); O'Brien (R. 1169–1178); Lohnes (R. 1178–1182).

3702). The contracts were themselves offered in evidence by petitioners' counsel (R. 1228–1230) after the Board's attorney had requested their production (R. 868–869). Thus the facts disclosing the circumstances under which the contracts were made were fully explored by both sides at the hearing. Under such circumstances, the Board clearly was free to pass on the issue raised. *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Higgins* v. *McCrea*, 116 U. S. 671, 684–685; *Lee* v. *Johnson*, 116 U. S. 48, 52; *Roberts* v. *Criss*, 266 Fed. 296 (C. C. A. 2d); *Noonan* v. *Gilbert* 68 F. (2d) 775 (App. D. C.).

Final proof of the fact that the pleadings and the course of the hearings had apprised petitioners that the contracts were in issue is furnished by the brief which they submitted to the Trial Examiner, and which was considered by the Board.[27] Approximately thirteen pages of this brief (pp. 2, 15–23, 135–139) were devoted to a description and defense of the contracts. Petitioners' claim of surprise now seems quite inconsistent with the statement in that brief (p. 17) that—

> the Board has no power to make any determination or order, under the Act, in this proceeding, and under such circumstances, in derogation of the contracts lawfully made with a recognized and lawfully existing labor organization, which contract is valid and subsisting under the laws of New York.

[27] A copy of this brief, certified by the Secretary of the Board, has been filed with the Clerk.

We submit, therefore, that in the light of all these factors, petitioners cannot claim to have been unaware from the time the contracts were entered into that they might be invalidated by the order of the Board. The complaint, the answers, the course of the hearings and their own interpretation of the issues as disclosed by their brief all indicate that petitioners not only had, but exercised, an opportunity to present their case with full knowledge that the validity of the contracts was in issue. The requirements of *Morgan* v. *United States,* 304 U. S. 1, 18, upon which petitioners rely, were fully met.

Nor under those circumstances could petitioners have been prejudiced by the absence of an intermediate report and an oral argument before the Board. This Court has specifically and recently held that when the issues were clearly defined, and no other prejudice is alleged, no violation of the Fifth Amendment can be predicated upon the absence of an intermediate report. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 350–351.

The absence of an oral argument raises a slightly different question. We deal in Point C, *infra,* pp. 55–58, with petitioners' contention that they were entitled to an oral argument whether the issues were adequately defined or not—a contention which goes to the validity of the whole order, rather than simply to the validity of Paragraphs 1 (f) and (g). We deal here solely with petitioners' more

limited contention that the absence of an oral argument deprived them of an opportunity to discover that the validity of the contracts was in issue (Br. p. 74).

The contention is answered, of course, by the facts stated above, which show clearly that petitioners could not have failed to realize from the outset that the validity of the contracts was in issue. Moreover, a complete answer to petitioners' claim is, simply, that they did not ask for either an oral argument or an intermediate report, and had no reason to expect that they would be accorded them without a request. Petitioners, it is true, assert the contrary (Br. pp. 8, 32), but we will show at pp. 56–58, *infra*, that their assertion is wholly erroneous. In these circumstances, no rights were violated. *Federal Radio Commission* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, 287; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, decided June 27, 1938, amended and petition for rehearing denied September 12, 1938 (C. C. A. 9th).

8. EVEN IF PETITIONERS WERE NOT ADEQUATELY APPRISED THAT THE VALIDITY OF THE CONTRACTS WAS IN ISSUE PRIOR TO THE ENTRY OF THE BOARD'S ORDER, THEY WERE NOT PREJUDICED THEREBY

Assuming, however, that petitioners were not in fact adequately informed, prior to the entry of the Board's order, that the validity of the contracts

was in issue in the present proceeding, nevertheless, we submit that they are not in a position to assert a claim of prejudice. After the entry of the order, two courses were open to them. (1) They might have applied to the Board for a rehearing on the issue of the validity of the contracts. (2) They might have applied to the court below, pursuant to subdivisions (e) and (f) of Section 10 of the Act, for leave to adduce additional evidence on the contract issue. Petitioners invoked neither alternative.

This Court unequivocally stated in the *Mackay* case, *supra,* that the Fifth Amendment does not prescribe a particular procedure, but protects substantial rights. If that is true, no claim under the Fifth Amendment should be open to one who fails at least to attempt to take advantage of the remedies afforded him by the administrative procedure. The attempts might have been futile, since neither the Board nor the court below was required by the Act to grant relief under the circumstances. Nevertheless, only if such procedural steps had been attempted without success would petitioners be in the position of the commission men in *Morgan* v. *United States.* See 304 U. S. at pp. 17, 24.

4. PETITIONERS' CONTENTIONS GO ONLY TO PARAGRAPHS 1 (F) AND (G)

Despite the fact that petitioners allege only that they were not sufficiently apprised of the issues

dealt with in Paragraphs 1 (f) and (g), they apparently suggest (Br. pp. 44, 70) that if their objections on this score be sustained, the whole order should be vacated. We submit that, on the contrary, the remainder of the order would be unaffected. There is no contention that the asserted failure to apprise them that the validity of the contracts was in issue in any way prejudiced them on any other branch of the case. No decision cited by petitioners supports the proposition that a holding that one portion of the order was entered without due notice and hearing requires that all other wholly independent portions of the order be set aside. Reason requires, we submit, that the order be enforced except as to any portion which may be held to have been entered without the due notice and hearing required by the Fifth Amendment.

B. PARAGRAPH 2 OF THE ORDER, INSOFAR AS IT REFERS TO STEPHEN L. SOLOSY, IS IN ALL RESPECTS VALID AND PROPER

Petitioners' claim to a denial of due process insofar as Paragraph 2 of the order is concerned is based upon the refusal by the Board to hear the proffered testimony of two witnesses. In the circumstances, we submit that the Board's action was entirely proper.

1. THE REFUSAL TO HEAR THE WITNESSES AT THE ADJOURNED HEARING WAS REASONABLY WITHIN THE BOARD'S DISCRETION AS TO THE CONDUCT OF THE HEARINGS

On June 23, 1937, the Board's trial attorney announced that the Board's case would probably be completed on the following day (R. 1102). When the Board's case closed on that day, June 24, petitioners' counsel requested an adjournment until July 6 to enable him to prepare petitioners' case and for the purpose of receiving the testimony of Carlisle and Dean, both then unavailable (R. 1186–1187). The Trial Examiner offered to recess the hearing until the following day, June 25, to receive the testimony of the available witnesses (R. 1311), but the offer was apparently not acceptable to petitioners. Petitioners' counsel did, however, ask for and obtain from the Trial Examiner permission to request a ruling by the Board itself (R. 1191). The Trial Examiner then recessed the hearing until July 6 for the purpose of receiving the testimony of Carlisle, reserving his own decision on whether the testimony of Dean and other witnesses would be received at that time (R. 1192).

Petitioners thereupon presented the matter directly to the Board by letter (R. 1545–1547). The Board replied, stating that the testimony of both Carlisle and Dean would be received on July 6, but that any other witnesses should have been produced on June 24 or 25, and would not be heard on July

6 (R. 1548–1550).[28] It should be noted, in view of petitioners' complaint that the decision was made by the Board (Br. pp. 28–31, 71), that petitioners themselves suggested that course (R. 1191).

In compliance with this ruling, after Carlisle and Dean had testified on July 6 the Trial Examiner refused to hear the testimony of Tompkins, a witness called by petitioners (R. 1309–1313). Petitioners' counsel then made an offer of proof as to the evidence he wished to elicit from Tompkins and another witness concerning the discharge of Stephen L. Solosy, and also of one Philemon Ewing (R. 1314–1316). The complaint contained no allegations covering Ewing, and no order was made with respect to him. No further offer of proof was made by petitioners (R. 1316).

In these circumstances, we submit, the refusal on July 6 to hear witnesses who were available on June 24 and 25 was reasonably within the Board's discretion concerning the "mode of conducting trials, the order of introducing evidence, and the times

[28] At the conclusion of the adjourned hearing on July 6, petitioners' counsel suggested that the additional testimony which he wished to present be taken, so that it would be available. The Trial Examiner, following the Board's ruling, refused to follow that course (R. 1312). Petitioners correctly point out (Br. p. 71) that in a letter of July 8, after the hearing, the Board erroneously stated that the suggestion had been made by the Trial Examiner, and rejected by petitioners' counsel. Petitioners are in error, however, in asserting that the Board's original ruling was based to any extent upon this misapprehension. The mistake was solely as to the events of July 6; the ruling, made on July 2 (R. 1548), states the basis upon which the Board acted.

when it is to be introduced." *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 463; *Cox* v. *Hart,* 145 U. S. 376, 380–381; *Fidelity & Deposit Co.* v. *Bucki & Son Lumber Co.,* 189 U. S. 135, 143; *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *E. Griffith Hughes, Inc.* v. *Federal Trade Commission,* 77 F. (2d) 886, 887–888 (C. C. A. 2d) certiorari denied, 296 U. S. 617.

Moreover, petitioners are not in a position to assert an infringement of constitutional rights. Pursuant to subsections (e) and (f) of Section 10 of the Act, petitioners might have applied to the court below for correction of the alleged prejudice. Their opportunity to do so was, in fact, specifically called to their attention in the Board's answer to the petition for review (R. 1698–1699). Nevertheless, petitioners did not apply. As the court below held, petitioners may not claim that their rights under the Constitution or the Act were prejudiced by their failure to pursue them. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 47.

2. IN ANY EVENT, THE OTHER PORTIONS OF THE ORDER ARE NOT AFFECTED

Contrary to the implications of petitioners' brief (pp. 73, 103), the offer of proof made by petitioners' counsel went to the single issue of Solosy's discharge (R. 1309–1316).[29] Obviously, petitioners

[29] The offer also included evidence as to the discharge of Philemon Ewing. Ewing, however, was not mentioned in the complaint, nor was he ordered reinstated.

cannot now contend that evidence as to any other allegation of the complaint was excluded. *Herencia* v. *Guzman*, 219 U. S. 44; *Williams* v. *Commissioner*, 44 F. (2d) 467 (C. C. A. 8th), *Hass* v. *United States*, 31 F. (2d) 13 (C. C. A. 9th); *Romeo* v. *United States*, 24 F. (2d) 527 (C. C. A. 9th); *Maryland Casualty Co.* v. *Simmons*, 2 F. (2d) 29, 30 (C. C. A. 5th); *Wustum* v. *Kradwell*, 270 Fed. 546, 551 (C. C. A. 7th).

The Board's error, therefore, if any there was, goes only to the findings and order regarding Solosy. Prejudice to petitioners cannot possibly extend further. No more here than with respect to Paragraphs 1 (f) and (g) (see pp. 49–50, *supra*) should a holding that there was error with respect to one small portion of an order vitiate the entire proceedings.

The cases cited by petitioners (Br. p. 72) are not to the contrary. *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, which is typical, held only that if evidence relevant to the entire order were improperly excluded, the entire order would be set aside. The decision is indisputably correct, but is completely inapplicable.

C. APART FROM THE CLAIM THAT PETITIONERS WERE NOT ADEQUATELY APPRISED OF THE ISSUES, THE ABSENCE OF AN ORAL ARGUMENT BEFORE THE BOARD DID NOT DEPRIVE PETITIONERS OF DUE PROCESS

Petitioners' first contention as to the absence of an oral argument, based on the assertion that it

would have apprised them that the validity of the contracts with the Brotherhood was in issue (Br. p. 74), has already been answered. See pp. 47–48, *supra*. Petitioners also make the further contention (Br. p. 32) that even on the assumption that the issues were clear and well known to both sides, the absence of oral argument vitiates the entire order. Their position is untenable (1) because petitioners did not ask for oral argument, and (2) because they were permitted to, and did, file a written brief setting forth their contentions.

1. It is a complete answer to the contention to point out that no right is violated when it does not appear that the complaining parties "sought any other hearing than that which was accorded." *Federal Radio Commission* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, 287. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47. Petitioners attempt, it is true, to avoid this obvious principle by seeking in their description of the proceeding to create the impression that they repeatedly requested opportunities for oral presentation of their case, which the Board denied (Br. 8, 32). An accurate statement of the proceedings will show that petitioners neither asked for an oral argument, nor had any reason to expect that one would be accorded them without a request.

After service of the complaint, but before the hearing, petitioners filed with the Board a motion

to dismiss the complaint on the ground that the Board was without jurisdiction (R. 19–21), for "a hearing upon this motion" (R. 20), and for a transfer of the proceedings to the Board itself in Washington, D. C., for a "hearing and decision of this motion and any further proceedings herein" (R. 21). The motion to dismiss, later renewed, was denied (R. 1200). No question is now raised as to that ruling. The motion to transfer the proceedings was denied on June 2, 1937, prior to the opening of the hearings (R. 38, 143), and a Trial Examiner was appointed in accordance with the usual practice (R. 37).

Interpreted most liberally, the request for a transfer of the proceedings to the Board in Washington, D. C., could only mean that the Board, if it denied the motion to dismiss, should itself sit to hear the evidence. The motion does not refer to oral argument, and, we submit, it is obvious that there was no intention to request it.

Nor did petitioners have any reason to believe that no decision would be made until an oral argument had been had. After the conclusion of the hearing the Board, in accordance with Article II, Section 37 of its Rules and Regulations, *infra*, pp. 77–78, which had been served upon petitioners with the complaint (R. 16), ordered the proceeding to be transferred to and continued before itself (R. 64). Under Section 38 of the same Article, *infra*, p. 78, it was thereafter within the discretion of the

Board to adopt any one of four enumerated procedures: (a) to direct the Trial Examiner to prepare a report; (b) to decide the matter forthwith upon the record or after the filing of briefs or oral argument; (c) to reopen the record for further evidence; or (d) to make other disposition of the case.[30] Consequently, during the period from September 29, 1937, to November 10, 1937, when the order was entered, it was at all times clear that the Board might, in the absence of a request for argument or an intermediate report, elect to "decide the matter forthwith upon the record." Petitioners made no request that any other procedure be adopted, a course which diligent assertion of their rights would certainly seem to require.[31] The Board therefore proceeded to decide the case with-

[30] Petitioners' suggestion (Br. p. 76) that Section 38 does not apply because it is restricted to the situation where a case has been transferred to the Board for the purpose of receiving evidence, is demonstrably erroneous. The Section applies in terms to "*any* proceeding on which the Board has assumed jurisdiction in accordance with Section 37." The contention is also expressly negatived by the fact that under Section 38 the Board may require a trial examiner's report, an impossibility if petitioners' construction is adopted. Moreover, petitioners' argument only proves that Section 29 of the Rules, *infra*, p. 77, applies. Under that Rule a request for oral argument would still be necessary.

[31] Section 38 does not expressly state that a request for oral argument may be made, or, if made, will be granted. The section does provide, however, that the Board may decide the case "forthwith upon the record, or after the filing of briefs or oral argument." The Board may obviously pursue the first course if neither the second or third, or both, are requested.

out argument but after consideration of the comprehensive brief which petitioners filed with the Trial Examiner. It was guilty of no "arbitrary refusal" (Br. pp. 44, 74) to grant petitioners any opportunity they desired to present their case. It is the invariable practice of the Board to grant leave to submit briefs or to argue orally before it upon request of the party proceeded against. This practice has not been departed from in the instant case.

2. Moreover, petitioners here had already presented their argument in writing in their printed brief of 152 pages filed with the Trial Examiner (R. 71). This brief was, of course, part of the materials transmitted by the Trial Examiner to the Board and was considered by it in reaching its decision (see, *e. g.*, R. 83). The Fifth Amendment does not require that one who has filed a brief should also be heard orally. "Argument may be oral or written. The requirements are not technical." *Morgan* v. *United States*, 298 U. S. 468, 481. Inasmuch as petitioners filed a brief, their rights were not infringed by the absence of oral argument.

III

The Board's Findings of Fact Are Fully Supported by Evidence

Although petitioners make the blanket assertion (Br. pp. 84, 91) that *none* of the findings of the Board on controverted issues are supported by evidence, and assert generally that hearsay evidence

predominated, they discuss the evidence in detail only with respect to the findings by the Board upon the discriminatory discharges of the six employees ordered reinstated (Br. pp. 91–104). Our detailed discussion here will, therefore, be limited in like fashion to the same issues. We shall briefly summarize the evidence which, we submit, adequately supported the Board's findings.[32] Finally, we shall demonstrate that the assertion with respect to hearsay evidence is without basis in either fact or law.

A. THE FINDINGS WITH RESPECT TO THE DISCRIMINATORY DISCHARGES OF THE SIX NAMED EMPLOYEES ARE FULLY SUPPORTED BY EVIDENCE

Wersing, Greulich, and Wagner.—These three men were employed in the work order bureau of the auditing department of the New York & Queens

[32] Petitioners also suggest (Br., pp. 89–90) that the finding with respect to industrial espionage was unsupported. The evidence in support of the finding is abundant (R. 312; 325–331, 337; 304–305, 317–318, 322; 300–302, 307–308; 319–320, 329–330). Petitioners' real objection to this portion of the order appears to be that the practice had been discontinued. Clearly, the discontinuance of an unlawful practice, without any showing or reason to believe that it will not be resumed, is no bar to the entry of an order upon findings supported by evidence that the illegal practices have occurred. *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202; *Armand Co., Inc.*, v. *Federal Trade Commission*, 78 F. (2d) 707, 708–709 (C. C. A. 2d); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 686–687 (C. C. A. 8th). See also *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671, 672 (C. C. A. 9th).

Electric Light & Power Company, Wersing and Greulich as clerks in the "stores accounting" division and Wagner as an accounting assistant in the "fixed capital" division (R. 413, 468, 527, 707, 723). Each had started work for the company in 1929 and, to the time of discharge, received the customary wage increases (R. 461–462, 527–528, 534–535, 703–708). It is not controverted that all three were capable employees (R. 462, 474–476, 535–543, 546, 709–711, 713–715, 1268).

In 1934 the three men were active in organizing and establishing in petitioners' system Local 103 of the Independent Brotherhood of Utility Employees and thereafter, as officers of the Local, were outstanding in its affairs, including particularly the publicizing and correction of grievances (R. 413, 420, 438, 471–472, 479, 495–496, 530–533, 547–549, 558–559, 573–576, 715–716, 718). Petitioner's partial restoration of a pay reduction during 1934 was attributed in the main to their efforts (R. 425–429, 504–505, 529–530). They likewise persistently attacked the Employees' Representation Plans as company-dominated organizations (R. 430, 438, 471–472, 479, 531–533, 547, 549, 559–561, 718). They made no secret of their activities; the articles in the Local's publication wherein petitioners' practices were condemned were either signed by them, or made frequent references to their position (R. 472, 532, 558, 574). Their participation in conferences as members of union committees likewise brought their activities to the attention of petitioners' officials, in particular on November 15,

1935, two weeks prior to their discharges (R. 422–435, 438–441, 469–470, 551–552, 556–558, 562). On that occasion Vice-president Dean evinced a resentful reluctance to deal with the committee on which they served (R. 440–441).

On November 29, 1935, all three of the men were discharged after separate but similar interviews with Payne of the personnel department, the reason assigned being that single men in other departments were being replaced by married men in the inventory department, which was to be discontinued (R. 478, 563–565, 719). Payne could not explain why single men with less seniority were being retained in preference to these three employees (R. 478, 566, 719), but Dean explained at the hearing that a triple test of efficiency, family responsibility, and seniority had been applied in order to make place in the auditor's department for six married men transferred from the inventory department, and that Wagner, Greulich, and Wersing, being unmarried and no more efficient that the married men, were selected for discharge (R. 1261, 1268, 1285–1287, 1257–1259). The defect in this explanation is apparent. There were 100 employees in the work order bureau to which the six men were to be transferred (R. 1276–1277); if the three men here involved had been compared with all of the others it might explain why single men of less seniority among the 100 had been kept in preference to them. But comparing Wagner,

Greulich, and Wersing with only the six transferees, as Dean did (R. 1268), obviously explains nothing. There is no plausible explanation in the record why unmarried men among the 100 employees in the same division who had less seniority than the three here involved (R. 720) were retained while they were dismissed.

Since there is no indication that lack of "seniority" or "family responsibility" caused the three discharges, we turn to the third standard, "efficiency". There is no claim that the three men were less efficient than single employees of less seniority who were retained. No efficiency ratings were available and the heads of the departments, who decided upon the discharges with Dean, did not consult the men's immediate supervisors (R. 1278, 1287–1288).[33] Wagner, it will be noted, was concededly an employee of more than average efficiency (R. 1268), and Greulich had been commended for his ability by his supervisors (R. 535–543, 546); their discharges are cogent indications that efficiency was not a weighty consideration.

In fact, even Dean was not too clear upon how the triple test had been applied. Although seniority was to be considered only if marital status did

[33] The selections for discharge were made by Dean, acting with the heads of the personnel, inventory and auditing departments (R. 1287). There is no claim that reports from bureau, division or section heads or from immediate supervisors were available or considered.

not differ (R. 1261–1262), he emphasized that the three unmarried men discharged were junior in point of service to the six transferees (R. 1268). The nature of the proferred explanations, in brief, buttresses the Board's conclusion, strongly indicated in any event by the simultaneous discharge of three outstanding leaders and officers of Local 103, that petitioners utilized the lay-offs accompanying the close of the inventory department to eliminate the officers of the then prominent Local.

Kennedy and Emler.—These two men were first-class linesmen in the overhead division of the New York & Queens Electric Light and Power Company (R. 588–589, 676). Both were employees of many years standing and received regular promotion and pay increases to the time of their discharges (R. 585–590, 671–676). Although a Plan representative, Kennedy denounced it as a company-dominated union (R. 613–614, 1390), with the result that petitioners' officials and supervisors termed him a "radical" and an "agitator" and advocated his expulsion from the Plan (R. 618–619, 623–624). Thereafter both Kennedy and Emler joined Local 103, were elected to office and were prominent in its affairs and activities (R. 605–607–608, 610, 628–631, 640, 677–678, 698). Both men served on the union committee, Kennedy as its chairman, which negotiated concerning the discharges of Wersing, Greulich, and Wagner (R. 630–631, 682).

Thereafter Kennedy, believing he could do most effective work within the framework of the Plan, decided to run for office in it again and, on June 11, 1936, was elected Plan representative for the overhead bureau (R. 640–644). Six days later he and Emler were advised that they were being laid off as "surplus employees" despite their eight years of continuous service, and on June 19 were formally discharged (R. 585, 647–648, 686–687, 692, 700).[34] Both Kennedy and Emler were senior to a large number of other employees in their bureau and they were the only first-class linesmen eliminated over a long period of time before and after their discharge (R. 650–651, 1292). At the time of their discharge both men were engaged in specific unfin-

[34] Petitioners claim that attempts were made to obtain work for Kennedy and Emler with the Consolidated Edison Company of New York (Pet. Br., p. 100). What occurred was that Payne, who laid the two men off on June 17, advised them to apply for positions then open at Consolidated which required certain technical qualifications that Kennedy and Emler did not possess. The men applied but were rejected (R. 660–662, 691–693, 699). The personnel officer who rejected them mentioned inferior jobs, at far lower pay than the men had been receiving, but added that those jobs were probably all filled anyway (R. 692). Thereafter Payne formally discharged the men on June 19 (R. 692). Petitioners' efforts to obtain work for Emler in December 1936 are even more illuminating. Emler was recommended by petitioners for a job with a company not connected with petitioners' system, but was warned that it would be embarrassing to petitioners if he started any "funny business" during his new employment (R. 693–694). Emler took the job at a substantially lower salary than he had been paid by petitioners (R. 694–695).

ished tasks which required their replacement (R. 652, 689).

At the hearing Dean attributed the discharges of Kennedy and Emler to reductions in the overhead bureau necessitated by the change of work in Queens from overhead to underground (R. 1262). But Dean manifested his incompetence so to testify by admitting his ignorance of lay-offs before and after the two discharges (R. 1297, 1300–1301). Nor did he controvert Kennedy's testimony that after the discharges, additional men were transferred to the overhead bureau, which was placed on a 6-day week (R. 652–653). Concerning the reason why 12 other men with less seniority were kept in preference to Kennedy and Emler, who were qualified to do both overhead and the increasing amount of underground work (R. 1302–1303), Dean vaguely referred to the "quality of their work," but demonstrated clearly that only their supervisors were qualified to pass on the men's efficiency (R. 1292–1293). Cf. *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 57. The supervisors did not testify and no efficiency ratings were introduced, nor had comparative efficiency been assigned as a cause at the time of discharge.[35]

[35] Petitioners imply (Br. pp. 101–102) that Kennedy's absences from work were due only "to some extent" to illness. The statement is directly contrary to the record. Kennedy testified that his absences were caused by illness arising from his employment and were on order of petitioners' physicians (R. 666–667). Dean, although he admit-

The lack of plausible explanation for the discharge of these men buttresses the already strong inference that petitioners wished to rid themselves of active union leaders. The discharges occurred but a week after Kennedy's election as Plan representative. During his previous tenure in that position he had proved worrisome to petitioners and it was certain that he would now renew his activity within the Plan. Discharge would entirely terminate his relationship with the Plan, while transfer to another company in the system would deprive him of his position as representative and place him among employees to whom he was unknown and upon whom he would, presumably, have little or no influence. The evidence is persuasive that for these reasons petitioners gave Kennedy a choice between discharge and transfer to an inferior position in another borough of the city. These reasons are, in the main, equally applicable to Emler, who was the last of the group actively associated with Wersing, Greulich, Wagner, and Kennedy, in Local No. 103. Petitioners made a clean sweep.

Solosy.—This man was employed by the Consolidated Gas Company as an inspector of certain

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ted that he did not know and had never attempted to find out what the doctor's diagnoses were, stated that the illness may have been attributable to other causes than his work for petitioners (R. 1293–1294). Petitioners' brief goes even beyond Dean's testimony by expressing doubt that the absences were all due to illness, contracted in the course of employment or otherwise.

instruments measuring the B. t. u. content of gas (R. 340–341). At the time of his discharge he had worked for that company for many years, and his steady pay increases attest his competency (R. 340–342, 345–346).

In 1934 Solosy, as a member of the Plan, served on a committee which was selected by the employees in his department to investigate the Plan and which reported it to be company-dominated (R. 353–355). Thereafter he joined the Independent Brotherhood of Utility Employees and was very active in its organization work, in the solicitation of members and in the publication of a monthly, "The Gas Man" (R. 359–366, 389). He and Philemon Ewing, the only other active union man in his department (R. 366), were trailed by detectives who filed reports with petitioners regarding their union activity (R. 300–302, 307–308, 319–320, 329–330). On January 17, 1936, both these men were discharged (R. 346). Solosy was told that his discharge was due to the closing of one of petitioners' gas plants (R. 347).[36] His supervisor, upon being pressed for details, said "You know more about it than I do" (R. 347), and doubted whether Solosy would ever be called back to work (R. 348). There were seven employees in Solosy's division, of whom he alone was discharged, although he was senior in point of service to two of the other six (R. 396, 398). The reason as-

[36] This is the sole ground set forth in the offer of proof which the Board rejected (Br. p. 103; *supra*, pp. 53–54).

signed at the time of discharge, and elaborated in the offer of proof, does not explain why Solosy was eliminated while his juniors were retained.

The only plausible explanation appears when it is realized that by the six discharges just discussed, and that of Ewing which is not complained of, petitioners eliminated all the principal organizers and leaders of Local 103, which was becoming increasingly active and annoying to petitioners in attacking the Plans (R. 353–357, 398–399, 504–505, 548–549, 556–560, 1096–1101, 1215). This elimination was too complete to have been a coincidence resulting from disinterested reduction in personnel. Petitioners, ignoring persuasive evidence indicating the true motive for the discharges (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 559), urge that certain other union members were not discharged (Br. p. 104). The fact that all union members employed by petitioners were not discharged is not a material consideration. *Cf. Associated Press* v. *National Labor Relations Board,* 301 U. S. 103. Petitioners fully accomplished their task by eliminating the six leaders, and thus set a significant example of what would happen to others whose union activity became too prominent.

B. THE ADMISSION OF HEARSAY EVIDENCE AT THE HEARING WAS WHOLLY PROPER

Petitioners' claim that illegal hearsay was made in great part the basis of the Board's finding is

wholly unfounded in fact, and is, in any event, without merit in law as ground for complaint. While admittedly some hearsay evidence was introduced at the hearing, the findings of the Board upon all of the charges alleged in the complaint are founded upon direct and primary evidence. The evidence upon which the Board based its findings as to jurisdiction is in the form of a stipulation entered into between counsel (R. 1318–1388) and is not in dispute. The findings with respect to the issue of coercion are in large part based upon the admission of Carlisle, the chief executive officer of Consolidated (R. 1202–1250), and the testimony of Straub, an officer of Consolidated's Employee Representation Plan and later active in the Brotherhood, whose knowledge was detailed and first-hand (R. 167–298, 804–841). The findings as to espionage are made in large part upon the testimony of Charles A. Smith, an operative employed by the detective agency utilized by Consolidated (R. 298–310), and Foster Strader, assistant manager of that agency (R. 310–339). The findings that Consolidated had discharged six men named in the complaint because of their union activity is based not only upon the testimony of the men involved (R. 340–410, 410–522, 526–583, 583–669, 671–703, 703–729), but upon the complete failure of the excuses offered as explanatory of the discharges by Consolidated through Dean, a vice president (R. 1254–1308). Whatever hearsay was admitted was in full corroboration of the direct and first-hand evidence thus introduced, and the Board was entitled to credit it, particularly

as it stood in the record almost entirely without plausible contradiction.

Aside from the foregoing, the claim is without merit. Section 10 (b) of the Act expressly provides that "the rules of evidence prevailing in courts of law or equity shall not be controlling" in proceedings before the Board. Moreover, hearsay evidence is clearly admissible and may be relied upon. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U. S. 117; *National Labor Relations Board* v. *Remington Rand Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, May 23, 1938; *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468 (C. C. A. 2d).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board

for such purposes, shall have power to issue, and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such or-

der may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall

have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States

upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

The relevant portions of the Rules and Regulations of the National Labor Relations Board, Series 1, as amended, are as follows:

SEC. 29. Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with permission of the Trial Examiner.

* * * * *

SEC. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(*a*) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(*b*) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(*c*) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this

Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

SEC. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

(*a*) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(*b*) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(*c*) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

(*d*) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence.

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